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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1076.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

DANIEL L. DUSTIN,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent in Opposition.

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Opinion Below.

The opinion of the court below is reported at Mass. Adv. Sh. (1977) 2302 and is correctly set forth in Appendix B of the petition filed by the Commonwealth of Massachusetts.

Jurisdiction.

The decision of the court below was entered on November 7, 1977. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3). In this particular case the respondent suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. § 1257(3) because the judgment lacks prerequisite finality.

Questions Presented.

I. Whether the decision of the Supreme Judicial Court affirming the order of a trial judge who allowed a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. § 1257(3)?

II. Whether the Supreme Judicial Court applied correct federal standards in requiring the exclusion from evidence of a defendant's statements even though the court found that they were voluntarily made, bore indicia of reliability and were not the product of any intentional violation of constitutional standards?

Constitutional Provisions Involved.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

The petitioner's statement of the case describing the proceedings below adequately sets forth the chronology of the state court proceedings.

Statement of the Facts.

The facts of this case are stated fully in the decision of the Massachusetts Superior Court trial judge (Petitioner's Appendix ("Pet. App.") C, pages 9a through 14a) and the decision of the Massachusetts Supreme Judicial Court (Pet. App. B, page 3a through 8a), and are adequately summarized in the Commonwealth's petition at pages 4 through 6.

Reasons for Denying the Writ.

I. The Decision of the Supreme Judicial Court Lacks Prerequisite Finality and is Not a Final Judgment under 28 U.S.C. § 1257(3).

The government relies heavily on *California* v. *Stewart*, 384 U.S. 436, 498 n. 71 (1966), as the predicate for the issuance of a writ of certiorari in this case. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court summarized "at least four categories . . . in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The language of this Court in *California* v. *Stewart* explaining its reasons for granting certiorari, 384 U.S. at 498 n. 71, and this Court's reference to *Stewart* in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 481, suggests that the basis for granting certiorari was, in reality, the "collateral order" doctrine. Indeed, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was

cited in the *Cox* case at the conclusion of the Court's discussion of the *Stewart* category of cases.[1] The collateral order doctrine suggests that, in addition to the requirement that the appellate matter be separate from and collateral to the merits of the claims pursued in the litigation, the appellate matter must also be too important to be denied effective review. As indicated by the government in its petition, the appellate matter must fall into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546.

The foregoing statement of this Court was followed, however, by Mr. Justice Jackson's admonition that ". . . we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents *a serious and unsettled question.*" 337 U.S. at 547 (emphasis supplied). It would seem, then, that *Stewart* should not be read as giving finality to every interlocutory order of a state's highest court which is decisive against the government on a motion to suppress evidence.[2]

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[1] The reference in *Cox* to *Cohen* most probably referred to that element of the collateral order doctrine that focuses on the lack of effective review after a completely final judgment. It would seem, however, that the *Cohen* requirement that the appellate matter must involve a "serious and unsettled question," 337 U.S. at 547, is alive and applicable to the question of finality.

[2] The petitioner concedes that the government can obtain no further review in the Supreme Judicial Court of Massachusetts regardless of the

DiBella v. *United States*, 369 U.S. 121 (1962), and *Carroll* v. *United States*, 354 U.S. 394 (1957), underscore this Court's historical reluctance to permit appeals from lower court rulings on motions to suppress. The thrust of these cases reveals a reluctance to permit such appeals in the absence of legislation granting clear and specific authority for the appeal. The mechanism established by the Commonwealth of Massachusetts does not require, as does its federal counterpart,[3] that the Attorney General or District Attorney, as the case may be, certify to the Superior Court judge or to the Single Justice of the Supreme Judicial Court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding. Under the Massachusetts interlocutory appeals statute, the government cannot secure a potentially "final judgment" unless the Single Justice reports the matter to the Full Court or to the Appeals Court. It is only when the Single Justice decides the appeal himself that the motion to suppress remains open for further review by the Full Court after trial in the same manner and to the same extent as if no application for interlocutory appeal had been filed. (In such a case double jeopardy would prevent a government appeal.)

The fact that a Single Justice of the Supreme Judicial Court can thwart any claim to finality by the government by deciding the motion to suppress himself suggests that the Massachusetts Legislature, in enacting the interlocutory

outcome of any future trial; but the Commonwealth has yet to concede that the allowance of the defendant's motion to suppress would be decisive of the government's case against the defendant. This concession should be made by the Commonwealth, it is submitted, at least to sustain the Commonwealth's contention that the questions presented in the petition are too important to be denied review.

[3] Criminal Appeals Act, 18 U.S.C. § 3731.

appeals statute, had no intention of providing for federal appellate review of interlocutory orders on motions to suppress.

The petition filed by the Commonwealth candidly admits on page 9 that "[t]he issue sought to be reviewed here (and only capable of review here and now) is *whether certain evidence must be excluded from the trial of the ultimate issue*" (emphasis supplied). This Court had occasion to comment on the reviewability of such an issue in the *DiBella* case:

> "Nor are the considerations against appealability made less compelling as to orders granting motions to suppress, by the fact that the Government has no later right to appeal when and if the loss of evidence forces dismissal of its case. *United States* v. *Pack*, 247 F. 2d 168 (C.A. 3d Cir. 1957); *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (C.A. 9th Cir. 1958). As the Ninth Circuit said of this circumstance, the Government is no more disadvantaged than in the case of an adverse ruling on the evidence during trial. *United States* v. *Rosenwasser*, 145 F. 2d 1015, 1018 (1944). What disadvantage there be springs from the historic policy, over and above the constitutional protection against double jeopardy, that denies the Government the right of appeal in criminal cases save as expressly authorized by statute. *United States* v. *Sanges*, 144 U.S. 310; *United States* v. *Dickinson*, 213 U.S. 92, 102-103; *Carroll* v. *United States*, 354 U.S. 394, 400-403 and n. 9-12. No such expression appears in 28 U.S.C. § 1291, and the Government's only right of appeal, given by the Criminal Appeals Act of 1907, 34 Stat. 1246, now 18 U.S.C. § 3731, is confined to narrowly defined situations not relevant to our problem. Allow-

ance of any further right must be sought from Congress and not this Court. *Carroll* v. *United States, supra,* 354 U.S., at 407-408." 369 U.S. at 130.

II. The Decision Below is Plainly Correct.

A. *The Lower Court's Decision is Wholly Consistent with the Principles of Miranda v. Arizona, 384 U.S. 436 (1966), and Post-Miranda Standards of Involuntariness.*

The decision of the Supreme Judicial Court, while not a paragon of clarity, correctly focused on the fact that the respondent was in custody and had been in custody for more than twenty hours when he asked, in effect, whether, if he made a statement, it could be used against him. The lower court correctly held that when the police officer's response carried an implication that the statement could not be used against the respondent, the principles enunciated in *Miranda* v. *Arizona,* 334 U.S. 436 (1966), were violated. (See Pet. App. B, page 6a.)

The lower court also held that even though the respondent had been informed of his right to counsel and appeared to understand it and was free to disregard the advice of counsel, a waiver of the respondent's right to counsel would nevertheless require not merely comprehension but relinquishment. The lower court held that: "In this context we apply the rule that the Commonwealth bears a 'heavy burden' to show a knowing and intelligent waiver, notwithstanding the absence of interrogation. The intention to waive constitutional rights must be made clear, without implication, inveiglement or subtlety, as it was, for example, in *Commonwealth* v. *Frongillo,* 359 Mass. 132,

137 (1971). The judge who saw and heard the witnesses concluded that there was no voluntary and intelligent waiver, and we cannot say he was plainly wrong. See *Commonwealth* v. *Hosey,* 368 Mass. , - (1975) [Mass. Adv. Sh. (1975) 2732, 2741-2743]. Even an innocent misrepresentation of the Miranda rights of the defendant renders suspect a claim that he waived those rights. See *Commonwealth* v. *Jones,* 457 Pa. 423, 435 (1974). The statement of the police officer is not easily characterized as 'scrupulously' honoring Miranda rights; it seems rather to be 'heedless' of those rights. See *Commonwealth* v. *Mahnke,* 368 Mass. , (1975)" (Pet. App. B, page 7a).

It hardly seems probable that this Court would permit the government to innocently misrepresent to a defendant, when he is placed in jail, that if he makes a statement it will not be used against him, and then permit the government to use an inculpatory statement made "voluntarily" twenty hours later. Similarly, it hardly seems probable that this Court would countenance the government placing a defendant in jail to await trial and then, twenty hours later, volunteering to him that if he made a statement it would not be used against him, and then receiving and using an inculpatory statement. The fact that the innocent misrepresentation is the answer to a defendant's question would appear to make the case for a *Miranda* violation stronger, not weaker. A question as to whether a statement can be used against the person asking the question implies that he does not know the answer or is in doubt as to the answer. The addition of a statement that if the police officer repeated the statement the defendant would lie is more indicative of mistrust of the police than it is of an awareness that the officer's answer was wrong.

In *Oregon* v. *Hass*, 420 U.S. 714, 714-715 (1975), this Court had occasion to deal with the following question:

> "When a suspect, who is in the custody of a state police officer, has been given full *Miranda* warnings and accepts them, and then later states that he would like to telephone a lawyer but is told that this cannot be done until the officer and the suspect reach the station, and the suspect then provides inculpatory information, is that information admissible in evidence solely for impeachment purposes after the suspect has taken the stand and testified contrarily to the inculpatory information, or is it inadmissible under the Fifth and Fourteenth Amendments?"

In deciding the foregoing question it was necessary for this Court to proceed upon the finding of the Oregon Supreme Court that the suspect's statement, though made without interrogation, was nevertheless obtained in violation of the principles set out in *Miranda* v. *Arizona*, 384 U.S. 436, 467-473 (1966).

The Court also found in *Hass* that even though the evidence was obtained in violation of *Miranda* principles it could still be used to impeach the defendant's contrary testimony at his trial as long as "the trustworthiness of the evidence satisfies legal standards." 420 U.S. at 722.

This Court went on to make the following observation in *Hass*, at page 723:

> "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose

> and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."

The balance struck in *Harris* v. *New York*, 401 U.S. 222 (1971), was that there was sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief. *Hass* suggests that traditional standards for determining voluntariness and trustworthiness rather than *Miranda* principles are better utilized in the determination of whether challenged statements are available for use *other* than in the prosecution's case in chief.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court had occasion to explicate the meaning of post-*Miranda* "voluntariness" by turning to a long line of cases previously decided by this Court in the process of determining whether confessions had been "voluntarily" given. The observation was made in *Schneckloth* that:

> "This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. 'The ultimate test remains that which

has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' *Culombe* v. *Connecticut*, *supra*, [367 U.S.] at 602." 412 U.S. at 225-226.

This Court went on to point out several illustrative cases wherein it concluded that in determining voluntariness this Court has "determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." *Id.* at 226.

Following the teachings of *Schneckloth* v. *Bustamonte*, the respondent suggests that the conversation between the respondent and his captor, Officer Tallman, constituted police activity likely to or expected to elicit a statement from the respondent and that, therefore, the deceitful and false nature of the officer's statement was a compelling factor in the respondent's decision to speak.

The psychological impact on the respondent of Officer Tallman's false statement that "You are not on the stand and you are not under oath. You can tell me anything you want to" had to create a false sense of security and become the motivating reason for the respondent's statement. In this context the respondent's statement was "involuntary" under *Miranda* principles and under post-*Miranda* notions of "involuntariness." *Miranda* v. *Arizona*, *supra*; *Schneckloth* v. *Bustamonte*, *supra*.

The *Miranda* decision indicates that any use of trick or deception will be viewed as a strong factor suggesting involuntariness. *Miranda* v. *Arizona*, 384 U.S. at 476. Under *Schneckloth* v. *Bustamonte* the post-*Miranda* test of voluntariness does not require automatic reversal where there has been deceit by the police, nor does the respondent make such a suggestion. It would seem, however, that an otherwise voluntary statement that is induced by a false and deceitful statement concerning a suspect's *Miranda* rights would cast an almost insurmountable burden on the police to justify its use. Even a valid waiver in the first instance would not validate a statement obtained by police misconduct occurring after such a waiver. See *Commonwealth* v. *McKenna*, 355 Mass. 313 (1969).

B. *The Lower Court's Decision is Consistent with and Supportable under the Principles Enunciated in Massiah v. United States and Brewer v. Williams.*

The lower court's decision is wholly consistent with and supportable by *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Brewer* v. *Williams*, 430 U.S. 387 (1977). The *Massiah* principle, which applies in state criminal cases by force of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), forbids the admission of statements made in any confrontation between law enforcement authorities and a defendant who neither has counsel nor explicitly waives counsel after the time of "initiation of adversary . . . proceedings" within the meaning of *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). Cf. *White* v. *Maryland*, 373 U.S. 59 (1963); *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968). In *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977), this Court had occasion to comment further on just when the right to counsel attaches and said:

"Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Kirby* v. *Illinois, supra,* at 689. See *Powell* v. *Alabama,* [287 U.S. 45]; *Johnson* v. *Zerbst,* 304 U.S. 458; *Hamilton* v. *Alabama,* 368 U.S. 52; *Gideon* v. *Wainwright, supra*; *White* v. *Maryland,* 373 U.S. 59; *Massiah* v. *United States,* 377 U.S. 201; *United States* v. *Wade,* 388 U.S. 218; *Gilbert* v. *California,* 388 U.S. 263; *Coleman* v. *Alabama, supra.*"

In the instant case the respondent had been formally charged and an arrest warrant had issued for his arrest (see Pet. App. C, pages 9a and 10a). He had been in police custody for twenty hours.

The respondent submits that his right to counsel had attached when he conversed with Officer Tallman because he was under arrest, had been booked and was incarcerated awaiting further proceedings. The trial judge found that when the respondent asked Officer Tallman the question: "If I tell you something about the incident, will I be admitting my guilt?" it "clearly indicated that he [the respondent] was confused about the legal consequences of making a statement" (Pet. App. C, pages 11a and 14a). The trial judge further found that when Officer Tallman answered this question by saying: "You are not on the stand and you are not under oath. You can tell me anything you want to," the respondent "was effectively, though not intentionally, deceived by the officer's response"

(Pet. App. C, pages 11a and 13a). All of these findings were affirmed by the Supreme Judicial Court (see Pet. App. B, pages 4a and 5a).

This Court's decision in *Brewer* v. *Williams,* 430 U.S. 387 (1977), indicates that *Massiah* has retained its original vitality.

It is true there must be interrogation to trigger the precepts enunciated in *Massiah.* Again, however, when the predicate for a statement is deceitful conduct by the government such conduct would seem to make *Massiah* applicable.

When Officer Tallman chose to answer the respondent's question, he took upon himself the burden of answering the respondent's question as truthfully and as correctly as possible, at least with respect to so much of the respondent's question as embraced *Miranda* rights. Officer Tallman testified that "when the defendant made inquiry as to the ramifications of his statement, the *Miranda* warnings came to mind . . . as having been studied in school, but he did not advise the defendant of any of his constitutional rights" (Pet. App. C, page 11a). What he did do was make an affirmative misrepresentation to the respondent which led the respondent to believe "that he was about to engage in a private conversation" (Pet. App. C, page 13a). This deceit, however innocent, prevented any valid waiver of the respondent's *Miranda* rights and preserved his protection under *Massiah*; and because the affirmative misrepresentation was the motivating factor for the respondent to speak, the *Massiah* principle deprives it of validity.

III. The Lower Court Decision can be Supported on the Ground that the Conduct of Officer Tallman was "Tantamount to Interrogation."

Officer Tallman's affirmative misrepresentation to the respondent was "tantamount to interrogation" and thus the

lower court's decision is in full accord with *Miranda*, *Massiah* and *Brewer*. In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the government candidly conceded that the "Christian burial speech" was "tantamount to interrogation." 430 U.S. at 399 n. 6. In *Brewer* the Court seems to have applied both a subjective and an objective test to determine whether Det. Leaming had interrogated the defendant Williams. Detective Leaming admitted at the trial that he was hoping to get all the information he could before Williams got to Des Moines where his lawyer, McKnight, was waiting. 430 U.S. at 399. Counsel for the state conceded the question at oral argument, 430 U.S. at 399-400 n. 6; and this Court held that the state court clearly proceeded upon the hypothesis that the "Christian burial speech" had been tantamount to interrogation. *Id.* at 400.

No such candor on the part of the government exists in this case. The trial judge found that "[t]here was no 'interrogation' of the defendant by Officer Tallman such as would trigger *Miranda* v. *Arizona* . . ." (Pet. App. C, page 12a). The trial judge further found that the respondent was given his *Miranda* warnings twice and that at both times he exercised his right to remain silent and all questioning ceased; although twenty-two hours had elapsed since the second set of warnings there was no questioning initiated by the officer (see Pet. App. C, page 12a).

The Supreme Judicial Court of Massachusetts rejected the argument that Officer Tallman's conduct was "tantamount to interrogation" (see Pet. App. B, page 6a).

The findings of the trial judge and the Supreme Judicial Court seem to be based upon a literal reading of *Miranda* and *Massiah* and a tortured reading of the conversation between Officer Tallman and the respondent. Both *Miranda* and *Massiah* clearly require interrogation, and the

respondent readily concedes this issue. The lower court's tortured analysis of the conversation between the police officer and the respondent and its resultant conclusion that the respondent's statement was not the result of "interrogation" is a flaw in the lower court's decision.

The Supreme Judicial Court correctly held that the "intention to waive constitutional rights must be made clear, without implication, inveiglement or subtlety . . ." (Pet. App. B, page 7a). It failed, however, to apprehend the natural and probable result that one might expect to occur when a suspect in a custodial environment decides to waive his right to silence. It should be expected that he would then decide to speak or make a statement; and the most probable subject might well be matters having to do with his incarceration.

The respondent submits that the conversation between Officer Tallman and the respondent amounted to "constructive interrogation" and was, therefore, "tantamount to interrogation." *Brewer* v. *Williams, supra*, 430 U.S. at 400. The decision of the Supreme Judicial Court can thus be supported under the full panoply of rights afforded to a formally charged defendant in police custody under the principles enunciated in *Miranda* v. *Arizona* and *Massiah* v. *United States*.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

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